United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

NO. 74-2098

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-2098

CONTAINAIR SYSTEMS CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 74-2132

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOCAL 295, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondent.

On Petition to Review and Application for Enforcement on Consent of an Order of The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether the Board properly approved the settlement stipulation, notwithstanding the Company's objections.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the petition of Containair Systems Corporation (herein, the "Company") to review an unreported order of the National Labor Relations Board (A. 34-39)[1] issued upon a settlement stipulation between the General Counsel and Local 295, International Brotherhood of Teamsters (herein, the "Union"). The Board has applied for enforcement and the Union has waived all defenses to enforcement of the order (A. 29). The petition to review and application for enforcement are brought pursuant to Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*). This Court has jurisdiction of the proceeding, the unfair labor practices having occurred at JFK International Airport and Springfield Gardens, New York.

A. Background

On February 22, 1974,[2] the Union struck the Company's Springfield Gardens plant in support of its demand for recognition as the collective-bargaining representative of the plant's employees (A. 9). Th e days later, the Company filed charges with the Board's Regional Office alleging thtat the Union had violated Section 8(b)(1)(A) of the Act by restraining employees in the exercise of their Section 7 rights and Section 8(b)(4)(B) of the Act by seeking to force a neutral employer, Emery Air Freight Corporation (herein "Emery"), to cease doing business with the Company (A. 2-3). On March 6, 1974, the Regional Director issued a consolidated complaint alleging that Union agents had enforced the strike picket line by threats of bodily injury and property damage in violation of Section 8(b)(1)(A). The complaint also alleged that Union agents had induced Emery employees not

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[1] "A." references are to the Joint Appendix to the briefs filed herein.

[2] All dates refer to 1974 unless otherwise indicated.

to handle Company products and had threatened Emery officials with an object in both instances of forcing Emery to cease doing business with the Company in violation of Section 8(b)(4)(B) (A. 6-12).

B. The settlement proceedings

Following discussions with the Union, the Regional Office forwarded a proposed settlement stipulation to Company counsel on March 7 and requested that the Company either join in the stipulation or submit written objections (A. 1). The proposed stipulation provided for entry of Board and Court orders requiring the Union to cease and desist from the alleged unfair labor practices and affirmatively requiring the Union to post an appropriate notice, to furnish signed copies for posting at the affected employers, and to notify Emery in writing that the Union had no objection to Emery doing business with the Company (A. 21-22, 25-29). The proposal also provided that the signing of the stipulation by the Union would not constitute an admission that the Union had violated the Act (A. 29). The Union signed the proposed stipulation on March 12, thereby waiving further proceedings before the Board and defenses before the Court (A. 27, 29-30).

The Company wrote to the Regional Office on March 18 objecting to inclusion of the non-admission clause and contending that the proposed order did not fully remedy the effects of the alleged picket line misconduct (A. 15-20). After considering the objections, the Regional Director advised the Company on March 22 that the non-admission clause was proper, since it would not affect the efficacy of the order; the Director stated, however, that the proposed order would be amended to track more closely the complaint allegations concerning picket line misconduct and that an additional paragraph would be added prohibiting the Union from violating Section 8(b)(1)(A) "in any like or related manner" (A.

21-22). On April 1 the Company wrote to the Regional Director renewing its objections to the amended stipulation (A. 23-24). The General Counsel, after reviewing the objections, notified the Company on April 30 that the settlement provided a complete remedy for the alleged unfair labor practices and that he was submitting the stipulation to the Board with a recommendation that the proposed order be issued (A. 32). On May 9 the Company wrote to the Board affirming its objections to the proposed stipulation (A. 33).

C. The Board's Decision and Order

After reviewing the Company's objections, the Board determined that the stipulation, by providing for entry of a formal Board order and consent court judgment, fully remedied the allegations of the complaint (A. 36). The Board therefore dismissed the Company's objections as lacking in merit, found that "it will effectuate the policies of the Act to approve the stipulation," and entered the order provided for in the stipulation (A. 34-39).[3]

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[3] The Board's order requires the Union, its officers, agents, and representatives to:

1. Cease and desist from:

(a) Threatening employees and supervisors of Containair Systems Corporation, herein called Containair, or any other employer, to inflict injury, or threatening to inflict damage, with an object to induce employees of Containair or any other employer to support and assist Local 295, or not to cross the picket line established by Local 295 at Containair's plant.

(b) In any like or related manner restraining or coercing employees of Containair, or any other employer, in the exercise of the rights guaranteed by Section 7 of the Act.

(c) In any manner or by any means, including strikes, work stoppages, picketing, threats, orders, directions, instructions, requests or appeals, however given, made or imparted, or by any like or related acts or conduct, or by permitting any such to remain in existence

(continued)

ARGUMENT

THE BOARD PROPERLY APPROVED THE SETTLEMENT STIPULATION, NOTWITHSTANDING THE COMPANY'S OBJECTIONS

It is well-settled that the unfair labor practice prohibitions of Section 8 are but a means to the statutory end of preventing labor disputes from obstructing the free flow of commerce. *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 362-363 (1940); *N.L.R.B. v. O.C.A.W.*, 476 F.2d

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[3] (continued)

or effect, engaging in, or inducing or encouraging any individual employed by Emery Air Freight Corporation, herei called Emery, or by any other person engaged in commerce or in any industry affecting commerce, to engage in a strike, work stoppage, or a refusal in the course of his employment to use, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services, or in any manner or by any means, threatening, coercing or restraining Emery or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require Emery, or any other person, to cease doing business with Containair or any other person.

2. Take the following affirmative action which the National Labor Relations Board finds will effectuate the policies of the National Labor Relations Act, as amended:

(a) Post immediately at its office at 179-30 149th Avenue, Springfield Gardens, New York, copies of the attached Notice to Members [A. 37, 39]. Copies of the said Notices, on forms provided by the Regional Director for Region 29, shall after being signed by [the Union] representative, be posted immediately upon receipt thereof, and maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by [the Union] to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish to the Regional Director for Region 29 signed copies of said Notice for posting by Containair and Emery, if they are willing, at places where they customarily post notices to their employees.

(c) Notify Emery, in writing, that [the Union] has no objection to its doing business with Containair.

(d) Notify the Regional Director for Region 29, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

1031, 1035 (C.A. 1, 1973). Thus, by enacting Section 8, Congress did not create a "private right of action" or "private administrative remedy" for victims of the proscribed conduct. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 268-269 (1940); *Local 282, I.B.T. v. N.L.R.B.*, 339 F.2d 795, 799 (C.A. 2, 1964). Rather, Congress intended that the Board, acting in the public interest, would prosecute unfair labor practice charges in a manner calculated to achieve and preserve industrial harmony. *Amalgamated Utility Workers v. Consolidated Edision Co., supra*, 309 U.S. at 264-265; *Concrete Materials, Inc. v. N.L.R.B.*, 440 F.2d 61, 67 (C.A. 5, 1971). The courts have therefore repeatedly held that when a charging party's demand for full litigation of his unfair labor practice allegations conflicts with the Board's determination that the statutory purpose is better served by formal or informal settlement, the private interests must give way.[4] *Local 282, I.B.T. v. N.L.R.B., supra*, 339 F.2d at 799; *I.L.G.W.U., Local 415-475 v. N.L.R.B.*, 501 F.2d 823, 832 (C.A.D.C., 1974); *N.L.R.B. v. O.C.A.W., supra*, 476 F.2d at 1036; *Concrete Materials, Inc. v. N.L.R.B., supra*, 440 F.2d at 67-68.

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[4] While a charging party may not unilaterally block a proposed settlement, its interests are carefully protected throughout the Board's settlement procedure. Thus, the Board's Rules and Regulations, (29 C.F.R.) Section 101.9(c), provide that a charging party may submit written objections to a proposed formal settlement to the Regional Director, the General Counsel, and the Board; if the proposed settlement is approved, the charging party is entitled to a written statement of the reasons for approval. If the Board enters an order upon a settlement stipulation, the charging party may obtain judicial review pursuant to Section 10(f) of the Act. Furthermore, other courts have held that a charging party must be afforded an evidentiary hearing on material issues of disputed fact presented by its objections as well as a presentation on the record of the reasons for settlement. *N.L.R.B. v. O.C.A.W., supra*, 476 F.2d at 1036-1037 and cases cited therein. But see, *N.L.R.B. v. Local 282, I.B.T., supra*, 339 F.2d at 799-801.

It is similarly well recognized that the statutory purpose is frequently better served by settlement than by full litigation of an unfair labor practice allegation. *Local 282, I.B.T. v. N.L.R.B., supra,* 399 F.2d at 799; *N.L.R.B. v. O.C.A.W., supra,* 476 F.2d at 1034. Thus, settlement has been termed the "lifeblood of the administrative process" (Final Report, Attorney General Comm. on Admin. Procedure, Sen. Doc. No. 8, 77th Cong., 1st Sess., p. 35) and its effectuation is of "manifest importance" in the administration of the Act. *Poole Foundry & Machine Co. v. N.L.R.B.,* 192 F.2d 740, 742 (C.A. 4, 1951), cert. denied, 342 U.S. 954 (1952). See also, *N.L.R.B. v. Newspaper and Mail Deliverers' Union,* 192 F.2d 654, 656 (C.A. 2, 1951). As the Supreme Court noted with approval in *Wallace Corp. v. N.L.R.B.,* 323 U.S. 248, 253-254 (1944): "To prevent disputes . . . the Board has from the very beginning encouraged compromises and settlements." The Board's Field Manual, Section 10124.1, further articulates the importance of resolving disputes short of litigation:[5]

> Settlement of a meritorious case is the most effective means to improve relationships between the parties and to permit the Board to concentrate its decisional activities in other cases, thereby expediting all case action. The expenditure of funds in connection with the formal stages of a case and the effect of the passage of time upon the effectiveness of the Board accomplishing the objectives of the Act dictate that the achievement of voluntary remedial action be given high priority and that complete and diligent effort be exerted to achieve the settlement of the greatest possible number of meritorious cases.

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[5] The relative importance of the settlement process is underscored by the fact that in fiscal 1974 the Board closed 6,870 cases by formal or informal settlement agreements; settlements thus accounted for 86 percent of all meritorious cases closed during the year. NLRB 39th Annual Report, Appendix Tables 7 and 7a, pp. 210-212.

The relevant considerations for the Board in determining whether to approve a settlement were set forth by the Board in *Farmers' Co-Operative Gin Association*, 168 NLRB 367 (1967):

> The Board must weigh such factors as the risks involved in protracted litigation which may be lost in whole or in part, the early restoration of industrial harmony by making concessions, and the conservation of the Board's resources. Moreover, the Board must evaluate the legal and factual merits disclosed by the administrative investigation to determine whether the allegations of violations in the complaint can be so clearly proved that no remedy, less than the maximum, can be accepted.

These considerations were explicitly approved in *Local 282, I.B.T. v. N.L.R.B., supra*, 339 F.2d at 799, where this Court held that the Board, after balancing the competing factors, could properly settle cases over the charging party's objections. Furthermore, the Board's determination that a settlement best effectuates the policies of the Act, calling, as it does, upon the exercise of its informed discretion, is entitled to judicial affirmance absent a clear showing that such discretion has been abused. *Concrete Materials, Inc. v. N.L.R.B., supra*, 440 F.2d at 68-69. See *Amalgamated Local Union 355 v. N.L.R.B.*, 481 F.2d 996, 1006-1008 (C.A. 2, 1973); *Lipman Motors, Inc. v. N.L.R.B.*, 451 F.2d 823, 828-829 (C.A. 2, 1971). As shown below, the Company has made no such showing in the present case.

The Company does not here contend that it was denied an opportunity to object to the settlement, that its objections were not considered, or that the Board's order does not enjoin each unfair labor practice alleged in the complaint. Nor could the Company successfully press such contentions. Its objections were twice presented to the Regional Director and then repeated before the Board. That the objections were carefully

considered is demonstrated by the written explanations of the Regional Director, the General Counsel, and the Board as well as by the Regional Director's action in amending the proposed order to conform more exactly to the complaint allegations. Moreover, the Board's order requires the Union to cease and desist from "in any like or related manner restraining . . . employees of Containair or any other employer" in violation of Section 8(b)(1)(A) or "in any manner or by any means" applying secondary pressure in violation of Section 8(b)(4)(B) (A. 37).

The Company nevertheless contends that the settlement in the instant case fails to remedy the alleged unfair labor practices solely because the stipulation contains a "non-admission" clause stating that "the signing of this stipulation . . . does not constitute an admission that [the Union] has violated the Act" (A. 29). This contention is clearly without merit. Such clauses are frequently incorporated in settlement agreements and the Board's decision to accept settlement stipulations containing such language has received explicit judicial approval. *I.L.G.W.U., Local 415-475 v. N.L.R.B., supra,* 501 F.2d at 832. *N.L.R.B. v. O.C.A.W., supra,* 476 F.2d at 1037; *N.L.R.B. v. I.B.E.W., Local Union 357,* 445 F.2d 1015, 1017 (C.A. 9, 1971). See *Local 282, I.B.T. v. N.L.R.B., supra,* 339 F.2d at 798. Furthermore, inclusion of the non-admission clause does not limit the Court's authority to issue a contempt citation if the Union were to continue the enjoined conduct. *N.L.R.B. v. O.C.A.W., supra,* 476 F.2d at 1037. See *N.L.R.B. v. Ochoa Fertilizer Corp.,* 368 U.S. 318, 323 (1961). Indeed, this Court recently held the Union in civil contempt of an order entered upon a settlement stipulation containing a non-admission clause. *N.L.R.B. v. Local 295, I.B.T.,* Docket No. 33979 (C.A. 2, 1973).

It is likewise well established that the Board possesses both the authority and expertise to determine the appropriate remedy for an unfair

labor practice. As the Supreme Court held in *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1964):

> [Section 10(c)] "charges the Board with the task of devising remedies to effectuate the policies of the Act." *Labor Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 346. The Board's power is a broad discretionary one, subject to limited judicial review. *Ibid.* "[T]he relation of remedy to policy is peculiarly a matter for administrative competence. . . ." *Phelps-Dodge Corp. v. Labor Board*, 313 U.S. 177, 194. "In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." *Labor Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 346. The Board's order will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. Labor Board*, 319 U.S. 533, 549.

Accord: *Amalgamated Local Union 355 v. N.L.R.B., supra*, 481 F.2d at 1006-1008; *Lipman Motors, Inc. v. N.L.R.B., supra*, 451 F.2d at 828-829.

The Board's order here effectively remedies the complaint allegations by enjoining the alleged unfair labor practices and by requiring the Union to post a signed "Notice to Members" stating:

> POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
>
> WE WILL NOT threaten employees . . . of Containair Systems Corporation, or any other employer, to inflict injury or threaten to inflict damage . . . to induce employees . . . to support and assist Local 295 or not to cross the picket line established by Local 295 at Containair's plant.
>
> * * * * *
>
> WE WILL NOT in any like or related manner restrain or coerce employees of Containair or any other employer in the exercise of the rights guaranteed by Section 7 of the Act (A. 37, 39).

The notice must remain posted at the Union's office for 60 days and signed copies must be made available for posting by the affected employers. The order also requires that the neutral secondary employer, Emery, be notified in writing by the Union that the Union has no objection to Emery doing business with the Company. Similar Board orders entered upon settlement stipulations containing non-admission clauses have repeatedly been enforced by this Court. See, *e.g.*, *N.L.R.B. v. New York Local Union 10, International Brotherhood of Production, Maintenance and Operating Engineers*, Docket No. 74-1990 (C.A. 2, July 25, 1974); *N.L.R.B. v. Furriers Joint Council, Amalgamated Meat Cutters and Butcher Workmen*, Docket No. 74-1966 (C.A. 2, July 19, 1974); *N.L.R.B. v. Local 295, I.B.T.*, Docket No. 74-1631 (C.A. 2, June 26, 1974); *N.L.R.B. v. Blouse, Shirt and Sportswear Workers Union Local 23-25, I.L.G.W.U.*, Docket No. 74-1602 (C.A. 2, May 7, 1974).

The Company urges (Br. 13-14, 22) that only a formal admission or adjudication of guilt can cure the effect of the Union's alleged misconduct and prevent future violations. As noted *supra*, however, the Board is allowed wide discretion in choosing remedies. Furthermore, the Company has failed to demonstrate how either an admission or an adjudication of guilt would have better effectuated the policies of the Act than the order issued upon the settlement stipulation.

As early as 1940 this Court explicitly held that the Board could not properly require an admission of guilt in its remedy for an unfair labor practice even where there has been a full litigation and adjudication of guilt. In *Art Metals Construction Co. v. N.L.R.B.*, 110 F.2d 148 (C. A. 2, 1940), the Court affirmed the Board's unfair labor practice finding, but refused to enforce the Board's order to the extent it required the employer to post a notice admitting the statutory violation. Writing for the Court, Judge Learned Hand explained:

> [W]e think that to compel [the employer] to say that he will "cease and desist," necessarily imports that in the past he has been [violating the Act]. Forcibly to compel anyone to declare that the utterances of any official, whoever he may be, are true, when he protests that he does not believe them, has implications which we should hesitate to believe Congress could ever have intended. . . . [W]e will not so construe the statute; nor are we disposed nicely to examine the scruples alleged; too long a history, and too dearly bought privileges, are behind such refusals. *Id.* at 151.

Judge Hand went on to discount the need for any admission of guilt:

> [W]e do not see what the words add to the effect of the notice. . . . We cannot suppose that the Board has any interest in the precise rubric adopted; but we can very well understand the sense of outrage which anyone may feel at being forced publicly to declare that he has committed even a minor dereliction of which in his heart he does not believe himself guilty. *Id.*

Accord: *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426, 438-439 (1941); *J.P. Stevens & Co. v. N.L.R.B.*, 380 F.2d 292, 304-305 (C.A. 2, 1967), cert. denied, 389 U.S. 1005.

Nor may the Company demand full litigation of its charges for the sole purpose of adjudging the Union guilty of the alleged unfair labor practices. Such litigation would necessarily have entailed pretrial preparation, a hearing, submission of briefs to an administrative law judge, drafting of a recommended decision, and submission of exceptions with supporting briefs to the Board prior to issuance of the final Decision and Order. Board and private resources would have been expended, relief for the affected employees would have been substantially delayed, and the Union might ultimately have prevailed at a trial on the merits, thereby foreclosing any relief whatsoever.

Moreover, the Board order issued in the present case provides the same sort of relief as orders issued following successful prosecution of unfair labor practice charges against the Union in two prior cases. See *Local 295, I.B.T. (Emery Air Freight)*, 197 NLRB 26 (1972), enforced, 82 LRRM 3091, Docket No. 72-1975 (C.A. 2, March 5, 1973); *Local 295, I.B.T. (Jet Air Freight)*, Board Case No. 29-CB-1624 (March 29, 1974). There is thus no reason to believe that, after incurring the expense, delay, and risks inherent in full litigation, the General Counsel could have obtained any additional relief not already provided by the present Board order. As Judge Friendly noted in *Local 282, I.B.T. v. N.L.R.B., supra*, 339 F.2d at 799: "The policy of the Act . . . requires that the Board be recognized as empowered to determine when the possible slight merit of a charge is outweighed by the sure and speedy concessions, the industrial harmony restored, and the savings of Board resources which a settlement can achieve."

In sum, the Board was not required to seek either an admission or adjudication of guilt and thus did not abuse its discretion in determining that the instant settlement agreement would best effectuate the policies of the Act.[6]

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[6] The Company's final contention (Br. 24-26) that the Board failed to articulate its reasons for accepting a non-admission clause is likewise without merit. Thus, the Regional Director advised the Company that "the inclusion of a non-admission clause in the Stipulation is proper because it in no way affects the efficacy of the Board Order or Court decree which would be sought in this case" (A. 21). The General Counsel, after setting forth the Company's objections, noted that the Stipulation "provides a full and complete remedy for the unfair labor practices alleged in the complaint" and "provides for a consent Board Order and Court Judgment" (A. 32). Finally, in specifically rejecting the non-admission clause objection, the Board explained that the General Counsel and Regional Director had 'advised the [Company] that the provision did not affect the efficacy of the Board Order or Court judgment, and thus represented no impediment to enforcement thereof" (A. 35). See *N.L.R.B. v. I.B.E.W., Local Union 357, supra*, 445 F.2d at 1017; *I.L.G.W.U., Local 415-475 v. N.L.R.B., supra*, 501 F.2d at 833.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition to review should be denied, that the application for enforcement on consent should be granted, and that a judgment should issue enforcing the Board's order in full.

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February, 1975.

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CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D. C.

this 12th day of February, 1975

(2A)